STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 25, 2003
v	No. 226311 Wayne Circuit Court
DEMETRIUS FOSTER, Defendant-Appellant.	LC No. 99-006195

Before: Markey, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317,[1] and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a third-offense habitual offender, MCL 769.11, to a prison term of thirty to fifty years for the murder conviction, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

This case stems from allegations that, during the early morning hours of November 17, 1998, defendant shot the decedent as a result of an earlier encounter at the decedent's former girlfriend's house. The decedent and Monique Brassell had lived together for three years, with their two children, and separated shortly before the incident. On November 16, at approximately 11:00 p.m., defendant, Rodney Taylor, and Rhonda Howard were visiting Brassell's home. Brassell had never previously met defendant. At approximately 1:00 a.m., defendant and Brassell engaged in sex. At approximately 2:00 a.m., the decedent, along with Deborah Hollins, Javan Carter, and Jerry Williams, went to Brassell's home. The decedent saw a truck outside of the house and began banging on the door. After Brassell opened the door, the decedent pushed past her and went into the house searching for another man. Hollins, Carter, and Williams also went into the house. The decedent was angered to find defendant inside and told him to leave. The decedent attacked Brassell and threatened to kill her. The decedent then went outside, smashed the windshield of defendant's Ford truck with a sledgehammer, and left. Brassell called the police, who were dispatched to her home around 2:15 a.m. and left around 2:30 a.m. Brassell testified that, while the police were at her house, defendant went outside and noticed that the decedent had smashed his windshield. Brassell indicated that defendant was angry when he

[1] Defendant was charged with first-degree premeditated murder, MCL 750.316.

came back into the house and that she tried to calm him down by volunteering to pay for the damage to his truck. Brassell further testified that, during her brief conversation with the police, she told them where the decedent lived. Defendant was in the room at that time. Defendant left Brassell's home after the police left. Howard and Taylor also left in a separate car. Taylor testified that he did not see defendant again that morning.

Hollins testified that, after leaving Brassell's home, she, the decedent, Carter, and Williams went through a restaurant's drive-thru. She indicated that the decedent was angry and that, after leaving the restaurant, they went to the decedent's cousin's house in search of a gun, which the decedent never obtained. The group then attempted to visit Hollins' boyfriend, but he was not home. Eventually, Hollins, Carter, and Williams took the decedent home. Hollins testified that, as the decedent was getting out of her car, a man approached the driver's side of the car, looked at her, and shot at the decedent approximately seven times. At trial, Hollins identified defendant as the shooter. Neither Carter nor Williams could positively identify defendant as the shooter but testified that the shooter was wearing a green jacket. There was testimony that defendant was wearing a green jacket at Brassell's home. The police were dispatched to the scene of the shooting between 3:00 a.m. and 3:30 a.m. The police recovered ten spent gun casings from a .40 caliber semiautomatic weapon. The decedent died as a result of a gunshot wound in the back.

I

Defendant first argues that, although he was sentenced within the sentencing guidelines' recommended range for second-degree murder, his sentence is disproportionate because he should have been sentenced at the lower end of the guidelines' range given the circumstances of this case.[2] We disagree.

This Court reviews sentences imposed on habitual offenders for an abuse of discretion. *People v Hansford (After Remand),* 454 Mich 320, 323-324; 562 NW2d 460 (1997). Here, defendant's argument is misplaced because he was sentenced as a third-offense habitual offender. The sentencing guidelines in effect at the time of this offense did not apply to habitual offenders, *People v Reynolds*, 240 Mich App 250, 253 n 1; 611 NW2d 316 (2000), and may not be considered on appeal in determining an appropriate sentence for an habitual offender.[3] *People v Gatewood (On Remand),* 216 Mich App 559, 560; 550 NW2d 265 (1996). Nonetheless, a sentence must be proportionate to the seriousness of the crime and the defendant's prior record. *People v Compeau*, 244 Mich App 595, 598-599; 625 NW2d 120 (2001). If an habitual offender's underlying felony and criminal history demonstrate that he is unable to conform his conduct to the law, a sentence within the statutory limit is proportionate. *Hansford, supra* at 326.

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[2] Defendant essentially argues that his sentence is disproportionate because the decedent "instigated the hostility" by breaking the window of his truck, and he notes that the decedent was riding around after that incident looking for a gun.

[3] Because the offense occurred before January 1, 1999, the judicial sentencing guideless were operative, as opposed to the statutory sentencing guidelines. *Reynolds*, *supra* at 254.

Here, as a third-offense habitual offender convicted of an underlying felony punishable by a maximum term of life, MCL 750.317, the court could have sentenced defendant to life imprisonment or a lesser term. MCL 769.11(1)(b). Thus, defendant's sentence of thirty to fifty years' imprisonment is within the applicable statutory limit. Further, defendant's prior criminal record, which includes 1991 and 1993 convictions for breaking and entering an occupied dwelling, and his current murder conviction stemming from the shooting death of the decedent demonstrate that he is unable to conform his conduct to the law. Accordingly, defendant's sentence is proportionate and, therefore, the trial court did not abuse its discretion when it imposed an enhanced sentence within the statutory limits.[4]

II

Defendant next argues that there was insufficient evidence to support a conviction of first-degree murder because there was no evidence of premeditation and deliberation and, therefore, the trial court erred by denying his motion for a directed verdict of that charge. We disagree.

This Court reviews a trial court's decision on a motion for directed verdict de novo to determine whether the evidence, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime were proved beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). This Court will not interfere with the trier of fact's role of determining the credibility of the witnesses. *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997). Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

In order to convict a defendant of first-degree premeditated murder, the prosecution must prove that the defendant intentionally killed the decedent and that the killing was premeditated and deliberate. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). "Premeditation and deliberation require sufficient time to allow the defendant to take a second look." *Id.* The elements of premeditation and deliberation may be inferred from the circumstances surrounding the killing. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). The following nonexclusive list of factors may be considered to establish premeditation and deliberation: (1) the previous relationship between the decedent and the defendant, (2) the defendant's actions before and after the crime, and (3) the circumstances surrounding the killing itself, including the weapon used and the location of the wounds. *People v Coddington*, 188 Mich App 584, 600; 470 NW2d 478 (1991).

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[4] It is noted that the guidelines' range for the underlying offense was 270 months to 450 months, and defendant was sentenced to a minimum term of 360 months. Even if the guidelines applied to defendant's enhanced sentence, he has not shown any unusual circumstances that would overcome the presumption that his minimum sentence within the guidelines is proportionate. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994).

The evidence in this case, viewed in the light most favorable to the prosecution, was sufficient to enable a jury to infer all the necessary elements of first-degree murder. The prosecutor theorized that defendant was angry because the decedent had smashed the window of his truck and that he subsequently went to the decedent's house, waited for him, and shot him as he exited his friend's vehicle. At trial, there was evidence that, during the early morning of the incident, defendant and the decedent had an altercation at the decedent's former girlfriend's house. Upon leaving, the decedent smashed the window of defendant's truck with a sledgehammer. There was evidence that defendant was angry about the decedent's actions and that the decedent's former girlfriend tried to calm him down by volunteering to pay for the damage. The evidence showed that the police arrived approximately ten minutes after the decedent left and stayed for approximately fifteen minutes. Although defendant claims that there is no evidence that he knew where the decedent lived, the evidence showed that he was present when the decedent's former girlfriend told the police where he lived. There was also evidence that defendant left the house after the police and, although the decedent had left earlier, he did not go directly home. Thus, a rational trier of fact could infer that defendant had time to arrive at the decedent's home before the decedent arrived. The evidence showed that, as the decedent was getting out of his friend's car, defendant approached the driver's side, looked at the driver, and began shooting toward the decedent, who was on the passenger side. The driver positively identified defendant at trial. Ten spent casings from the same weapon were recovered from the scene. The decedent died as a result of one gunshot wound in the back. This evidence, viewed in the light most favorable to the prosecution, was sufficient to sustain a conviction for first-degree murder and, thus, the trial court did not err by denying defendant's motion for a directed verdict.

III

Defendant also argues that the prosecutor's questioning of a police witness denied him a fair trial because the elicited testimony implied that he had committed prior criminal acts. Again, we disagree.

Because defendant failed to raise this claim below, this Court reviews this unpreserved claim for plain error affecting his substantial rights, i.e., error affecting the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

During the prosecutor's direct examination of an investigating officer regarding how he located defendant, the following exchange occurred, in relevant part:

> *Q*. How was your first contact with [defendant's friend]?
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> * * *
>
> *Q*. Okay. At that time, before you had talked to [defendant's friend], before you had talked to [defendant's friend] [sic], what did you know about the identity of the defendant, Demetrius Foster?
>
> *A*. Just that his nickname was Dee.

Q. Were you able, after talking to [defendant's friend], to get – well, how did you get the full name of the defendant?

A. [Defendant's friend] gave it to me.

Q. Okay. Were you also able through [defendant's friend] to identify the defendant by face, get him identified by face, that, -so that you knew who [defendant] was that you were looking for?

A. Yes, based on information that [defendant's friend] gave to me, *I ran the defendant's name through our computer system and it came back with a hit that the defendant--*

Q. You had a picture, is that correct?

A. Yes, that's correct. [Emphasis added.]

The record demonstrates that the witness' response regarding defendant's name being in the police computer system was an unsolicited answer to a properly asked question. The prosecutor merely asked the witness whether he was able, through defendant's friend, to identify him by face, a question that required an affirmative or negative response. Generally, "an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). In addition, the prosecutor immediately interrupted the witness and redirected his response by asking whether he had a picture of defendant. Further, there were no repeated references to the matter, there was no indication that defendant had a prior criminal record, and any inference that such a prior record existed based on the prosecutor's question and the witness' response is tenuous. Accordingly, defendant has failed to demonstrate plain error and, thus, this claim does not warrant reversal.

In relation to this claim, defendant also argues that he is entitled to a new trial because defense counsel was ineffective for failing to object to the officer's testimony. We disagree.

Because defendant failed to make a testimonial record concerning this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review of this issue is limited to mistakes apparent on the record.[5] *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.* A defendant must

[5] Although this Court granted defendant's motion to remand for an evidentiary hearing related to his claim of ineffective assistance of counsel, it was limited to those issues raised in his motion and this issue was not raised.

also overcome the presumption that the challenged action or inaction was trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Here, defendant has not overcome the presumption that defense counsel's failure to object was trial strategy. Given the brief and isolated nature of the officer's comment, defense counsel may have determined that an objection would have called more attention to the allegedly improper testimony. *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, even if counsel was ultimately mistaken, nor will it assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Moreover, as previously indicated, the prosecutor immediately interrupted the witness and redirected his response. Finally, in light of the evidence presented at trial, it is unlikely that, but for defense counsel's alleged inaction, the outcome would have been different. *Effinger*, *supra* at 69. Accordingly, defendant is not entitled to a new trial on this basis.

IV

Defendant next claims that defense counsel was ineffective because he failed to request an instruction on voluntary manslaughter, MCL 750.321. We disagree.

Because defendant failed to make a testimonial record in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review of this issue is limited to mistakes apparent on the record. *Sabin*, *supra* at 658-659.

Manslaughter is a cognate lesser-included offense of murder. *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991). An instruction on a lesser-included offense is appropriate only if there is sufficient evidence to support a conviction of the lesser offense. *Id.* at 387. To support a conviction of voluntary manslaughter, there must be evidence that (1) the defendant killed in the heat of passion, (2) the passion was caused by adequate provocation, and (3) there was no lapse of time during which a reasonable person could have controlled his passions. MCL 750.321; *Pouncey*, *supra* at 388; *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998).

Here, the evidence did not support a conviction for voluntary manslaughter, because there was no evidence to support a finding that defendant acted with reasonable provocation. The element of provocation distinguishes manslaughter from murder, and the provocation necessary to mitigate a homicide from murder to manslaughter is that which would cause the defendant to act out of passion rather than reason. *Sullivan*, *supra* at 518. Provocation is adequate only if it is so severe or extreme that it would provoke a reasonable person to lose control. *Id.* Here, defendant's conduct was allegedly based on the decedent smashing out the window of his truck a half hour or more before the shooting. During this lapse in time, defendant spoke to the decedent's former girlfriend, who told him that she would pay for the damage, and he also stayed at her home while she spoke to the police. Defendant left after the police and eventually went to the decedent's home. Simply put, defendant's actions are not indicative of a person acting with passion or hot blood. Because the evidence did not merit a voluntary manslaughter instruction, defense counsel was not ineffective for failing to seek such an instruction. Counsel "is not

required to advocate a meritless position." See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).[6]

Moreover, defendant has failed to overcome the presumption that defense counsel's failure to request a voluntary manslaughter instruction was sound trial strategy. In this case, the defense strategy was to argue that defendant was not the shooter and had been erroneously identified. Defense counsel's decision to pursue this defense and not request a manslaughter instruction falls within the purview of trial strategy, see *People v Sardy*, 216 Mich App 111, 116; 549 NW2d 23 (1996), which we will not second-guess on appeal. *Rice, supra* at 445. "The decision to proceed with an all or nothing defense is a legitimate trial strategy." *People v Nickson*, 120 Mich App 681, 687; 327 NW2d 333 (1982). See also *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *People v Rone (On Second Remand)*, 109 Mich App 702, 718; 311 NW2d 835 (1981). Accordingly, defendant is not entitled to a new trial on this basis.

V

Defendant's final claim is that he is entitled to a new trial because defense counsel was ineffective for failing to subpoena and call an alibi witness. The proposed alibi witness testified at a post-conviction evidentiary hearing that defendant was at his residence playing cards at the time of the shooting.

The failure to call a supporting witness does not inherently amount to ineffective assistance of counsel, and there is no "unconditional obligation to call or interview every possible witness suggested by a defendant." *People v Beard*, 459 Mich 918, 919; 589 NW2d 774 (1998). Ineffective assistance of counsel can take the form of a failure to call a witness or present other evidence only if the failure deprives the defendant of a substantial defense that would have affected the outcome of the trial. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Moreover, decisions regarding whether to call or question witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel's failure to prepare for trial resulted in counsel's ignorance of, and hence failure to present, valuable evidence that would have substantially benefited the defendant. *People v Caballero*, 184 Mich App 636, 640-642; 459 NW2d 80 (1990). A claim of ineffective assistance of counsel cannot be premised upon the failure to present perjurious testimony. *LaVearn, supra* at 217-218.

In this case, defendant claims that trial counsel's failure to call the proposed witness deprived him of a substantial defense. However, we find that defendant has failed to overcome

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[6] In *People v Cornell*, 466 Mich 335, 354-355, 357, 359; 646 NW2d 127 (2002), our Supreme Court concluded that MCL 768.32 only permits instruction on necessarily lesser included offenses, not cognate lesser offenses. See also *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002). Because voluntary manslaughter is not a necessarily lesser-included offense of murder, an instruction on voluntary manslaughter would not have been proper under *Cornell*. However, the *Cornell* decision was "given limited retroactive effect, applying to cases pending on appeal in which the issue has been raised and preserved." *Cornell, supra* at 367. Because this issue was not preserved below, we do not rely on *Cornell* as the basis for our decision.

the presumption that defense counsel's failure to call the proposed alibi witnesses was sound trial strategy. See *Rockey, supra* at 76. During the post-conviction evidentiary hearing, defendant's trial counsel testified that he decided not to pursue an alibi defense based on his interview with the proposed witness, but rather chose to focus on challenging the eyewitness identification of defendant. Counsel's trial strategy assessment was supported by the fact that he believed that the alibi witness' recantation of the events was not strong, "was vague," and did not include the necessary details. He further testified that he did not believe that the proposed witness "would be able to convey [defendant's alibi] to the jury" or that it would support the defense theory. Counsel acknowledged that presenting an alibi witness could be damaging to a case depending on the witness. As previously indicated, we will not substitute our judgment for that of counsel regarding matters of trial strategy, even if counsel was ultimately mistaken, nor will we assess counsel's competence with the benefit of hindsight. *Rice*, *supra* at 445.

Further, we note that, during the hearing, it was revealed that the proposed witness and defendant are close friends of more than ten years, and that the proposed witness visited defendant in jail and prison and was present during his trial. Nonetheless, the proposed witness admitted that, although defendant told him two days after the shooting that he had been accused of the crime, he never went to the police, and he recalled for certain that he first told defense counsel about defendant's alibi during the trial. He also indicated that he never previously mentioned to defense counsel that two other individuals were with him and defendant on the night of the incident, nor did he advise the two individuals that they could provide an alibi for defendant. It is also noteworthy that the witness' statement is dated October 27, 2000, which was nearly eight months after defendant was tried and convicted. In sum, defendant has failed to sustain his burden of proving that he received ineffective assistance of counsel at trial.[7] Accordingly, defendant is not entitled to a new trial on this basis.[8]

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[7] Defendant's reliance on our Supreme Court's decision in *Johnson*, *supra*, is misplaced. In that case, the defendant was convicted by a jury of second-degree murder and felony-firearm. *Id*. at 116-117. Our Supreme Court affirmed this Court's holding that the defendant was denied the effective assistance of counsel by trial counsel's failure to call six supporting witnesses. Of the six potential witnesses, four were eyewitnesses who would have testified that the defendant did not shoot the decedent and did not shoot a gun at any time. *Id*. at 118, 122. During an evidentiary hearing, trial counsel stated that he believed he spoke with two or three of the witnesses, but had little or no recollection of what was said. *Id*. at 123. The Court held that the exculpatory evidence not presented to the jury was "so substantial" that it could have changed the outcome of the trial. *Id*. at 122. The Court also held that trial counsel's "remarkably vague and inconclusive" testimony regarding why the potential witnesses were not called exhibited no sign that trial counsel made a strategic decision not to call the six witnesses. *Id*. at 123, 124. The Court noted:

> We further observe that trial counsel failed to offer testimony that meets even minimal standards of performance for his client or of his obligation as an officer of the court. Fairly summarized, the testimony was that he had no file entries, no recollection, and not even a routine practice that might indicate what he did on defendant's behalf. [*Id*. at 125.]

(continued…)

Affirmed.

/s/ Janet E. Markey
/s/ Michael R. Smolenski
/s/ Patrick M. Meter

(…continued)

However, in this case, defense counsel recalled the case, spoke to the proposed witness, and indicated that he made a strategic decision not to call the witness. Accordingly, the facts in *Johnson* are distinguishable and, thus, that case does not support reversing defendant's conviction. Likewise, defendant's reliance on this Court's decision in *People v Le*wis, 64 Mich App 175; 235 NW2d 100 (1975), is distinguishable for the same reasons.

[8] We note that, following the evidentiary hearing held after a remand granted by this Court, the trial court sua sponte and gratuitously opined that defendant was denied the effective assistance of counsel. However, the trial court did not enter an order for a new trial, and this Court subsequently denied defendant's motion for remand for entry of such an order because the trial court exceeded its authority on remand by ruling on the necessity of a new trial. We note that in making its comment, the court essentially opined that it is *per se* ineffective for any attorney not to present an alibi defense if the defendant has one. However, that this reasoning is flawed because decisions regarding whether to call witnesses are presumed to be matters of trial strategy, *Rockey*, *supra* at 76, and the court's reasoning incorrectly takes such decisions out of the purview of trial strategy.